Viewpointe Archive Services, LLC v. Datatreasury Corporation Doc. 45

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

VIEWPOINTE ARCHIVE SERVICES, L.L.C.,	§	
Plaintiff,	§	Civil Action No. 2:05-cv-00459-DF
vs.	§	
DATATREASURY CORPORATION,	§	Judge David Folsom
Defendant.	§	

Viewpointe Archive Services, LLC's Unopposed Motion to Consolidate Its Declaratory Judgment Action with 2:06-cv-72-DF-CMC and Brief in Support

Viewpointe Archive Services, LLC ("Viewpointe"), Plaintiff in the above captioned civil action, respectfully moves the Court pursuant to Federal Rule of Civil Procedure 42(a) for an Order consolidating Viewpointe's Declaratory Judgment Action ("Viewpointe-II") with *DataTreasury Corp. v. Wells Fargo & Co., et al.*, 2:06-CV-72-DF-CMC ("Viewpointe-I"), currently before this court.

PRELIMINARY STATEMENT

In the interests of judicial economy and to avoid unnecessarily duplicative effort, Viewpointe moves to consolidate this action—Viewpointe-II—with the pending action 2:06-CV-72-DF-CMC—Viewpointe-I. In Viewpointe-I, DataTreasury Corporation ("DataTreasury") charges Viewpointe with patent infringement and Viewpointe asserts certain declaratory judgment counterclaims. These same declaratory judgment claims form the basis of Viewpointe's complaint in Viewpointe-II. Both parties recognize that maintaining these two separate and duplicate actions is a waste of time and resources, and thus wholly agree that

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Viewpointe-II should be consolidated with Viewpointe-I. This Court has currently scheduled a Status Conference in Viewpointe-II for April 4, 2007, so Viewpointe respectfully requests that as a part of its consolidation order, the Court vacate the Status Conference and remove Viewpointe-II from its docket.

STATEMENT OF FACTS

On June 28, 2005, DataTreasury filed a patent infringement action against Viewpointe in the Eastern District of Texas (Viewpointe-I), alleging infringement of U.S. Patent Nos. 5,910,988 and 6,032,137 (collectively, the "patents-in-suit"). Shortly after the filing of DataTreasury's Complaint, on July 7, 2005, Viewpointe filed a separate Complaint for Declaratory Judgment in the Northern District of Texas (Viewpointe-II). In its Complaint, Viewpointe sought a declaratory judgment that: (i) Viewpointe has not and is not infringing any claim of the patents-in-suit, (ii) the patents-in-suit are invalid and void for failing to comply with the statutory conditions for patentability, and (iii) the patents-in-suit are unenforceable as a result of inequitable conduct before the U.S. Patent & Trademark Office. Viewpointe would eventually answer DataTreasury's Complaint in Viewpointe-I on March 23, 2006, alleging precisely the same claims of non-infringement, invalidity, and unenforceability of the patents-in-suit as it did in its declaratory judgment action filed in Viewpointe-II.

On September 29, 2005, Viewpointe-II was transferred from the Northern District of Texas to the Eastern District of Texas. On June 1, 2006, Viewpointe-I was consolidated with *DataTreasury Corp. v. Wells Fargo & Co.*, Case No. 2:06-CV-72-DF-CMC, in which DataTreasury asserts claims of infringement involving the patents-in-suit (and other patents) against a variety of other defendants. As a result, there are now two cases pending before this Court in which Viewpointe asserts identical claims of patent non-infringement, invalidity, unenforceability—one in which it is a Plaintiff, and one in which it is a Defendant. Rather than separately and unnecessarily considering its three declaratory judgment claims a second time in the context of Viewpointe-II, we respectfully request, with DataTreasury's consent, that the Court consolidate Viewpointe-II with Viewpointe-I, thus removing this duplicative action from its docket.

ARGUMENT

Equity and all economies overwhelmingly favor consolidation of these two cases. Pursuant to Federal Rule of Civil Procedure 42(a), a Court has the power to consolidate actions "involving a common question of law or fact" under. *See* Fed. R. Civ. P. 42(a); *see also Mutual Life Ins. Co. of New York v. Hillmon*, 145 U.S. 285, 292 (1892) (holding that courts have "discretionary power" to consolidate cases where they are of "like nature and relative to the same question" to "avoid unnecessary cost and delay") (citing a precursor statute to Fed. R. Civ. P. 42(a)). In fact, in the Fifth Circuit, "'district judges have been urged to make good use of Rule 42(a)'" as a tool to "'expedite the trial and eliminate unnecessary repetition and confusion.'" *In re Air Crash Disaster at Florida Everglades* on December 29, 1972, 549 F.2d 1006, 1013 (5th Cir. 1977) (quoting *Gentry v. Smith*, 487 F.2d 571, 581 (5th Cir. 1973)). "The purpose of consolidation is to permit trial convenience and economy in administration." *Id.* at 1014.

Viewpointe-I and Viewpointe-II involve identical questions of law and fact. The questions of claim construction, infringement, and patent invalidity at issue in Viewpointe-II are precisely those found in Viewpointe-I. Moreover, Viewpointe-II necessarily involves the same discovery that will produced in Viewpointe-I and would involve the same experts.

In the interests of the parties and this Court, Viewpointe-II and Viewpointe-I should be consolidated. Combining the two actions should have no prejudicial effect on any of the parties involved—indeed, both parties agree that consolidation is the best course of action. In contrast, keeping these actions separate will entail duplication of effort and much waste of resources and work product.

CONCLUSION

For all of the foregoing reasons, Viewpointe respectfully requests that this Court consolidate Viewpointe-II with Viewpointe-I, and cancel the April 4, 2007, status conference scheduled in Viewpointe-II.

Dated: April 2, 2007

Respectfully submitted,

/s/ John R. Emerson
John R. Emerson
Texas State Bar No. 24002053
HAYNES AND BOONE, L.L.P.
901 Main Street, Suite 3100
Dallas, Texas 75202-3789
Tel: 214-651-5000
Fax: 214-651-5940

Of Counsel:

Edward V. Filardi
Daniel A. DeVito
P. Anthony Sammi
Marti A. Johnson
SKADDEN ARPS SLATE MEAGHER & FLOM LLP
Four Times Square
New York, NY 10036-6522
Tel: 212.735.3000
Fax: 212.735.2000

ATTORNEYS FOR VIEWPOINTE ARCHIVE SERVICES, LLC

CERTIFICATE OF CONFERENCE

Daniel A. DeVito, counsel for Viewpoint Archive Services, LLC, conferred via telephone with counsel for DataTreasury, Rodney A. Cooper. The parties agree that Viewpointe-II is redundant to Viewpointe-I and should not continue to stand as a separate action. The parties further agree that the April 4, 2007, Status Conference scheduled in Viewpointe-II is unnecessary. Thus, DataTreasury indicated that they would not oppose the relief sought herein.

/s/ Daniel A. DeVito (by permission, John R. Emerson)
Daniel A. DeVito

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Viewpointe Archive Services, LLC's Unopposed Motion to Consolidate Its Declaratory Judgment Action with 2:06-cv-72-DF-CMC and Brief in Support was served on all counsel of record who are deemed to have consented to electronic service via the Court's CM/ECF filing system per Local Rule CV-5(a)(3) on the 2nd day of April, 2007.

/s/ John R. Emerson
John R. Emerson